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No. 85-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EL CID, LTD.,

Petitioner,

vs.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC OUAT LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND, and DAVID M. KOOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Introductory Statement

The Gulf & Western ("G&W") defendants' Brief in Opposition demonstrates how readily in this case their forensic skill led to the publication of bad law.* It sharpens the issues of fact, making the summary judgment below more dubious on its face. It sharpens the issues of law, thus highlighting the appropriateness of review by this Court.

On the facts, G&W argue that everything happened abroad, no wrong occurred, and they weren't part of it if it did. Replying to that bland illusion, suffice it here to repeat that both lower courts assumed the illegality of all defendants' conduct but dismissed the Sherman Act claim on "commerce" and "competition" grounds. A-2; B-3. We reply on the legal issues discussed by G&W:

Point 1. *The District Court Confused the "Effect on Commerce" Requirement of the Sherman Act.*

As G&W argue, the District Court held that *defendants'* conduct did not have the required impact on U.S.-foreign commerce because *plaintiff* had not yet imported gold, etc. B-6. The Court of Appeals said, as G&W note (BO-11), that this non sequitur "may well have been correct." A-2. G&W erroneously state that "Petitioner does not even seek review by this Court of this critical issue."** BO-11. In fact, we raised the

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* Herein the Brief in Opposition is cited "BO- ." The Certiorari Petition is cited "CP- ." The decisions below which are reproduced in the CP continue to be cited "A- " and "B- ." "JA- " continues to signify the Joint Appendix below.

** We agree with G&W that this issue was "critical" below. It was on this issue, really, that the Court of Appeals simply terminated nine years of litigation with its demonstrably wrong observation that El Cid could not raise the $25,000 entrance fee that the Sherman Act does *not* require, notwithstanding the record fact that defendants' machinations drove Groves' millions away from El Cid and the Bolgol.

issue in Nos. 5 and 6 of our Questions Presented (PC-i) and argued it in Point 1(c). PC-12-14. Our Question No. 4 and Point 1(a) and (b) also address the issue, since the injury to competition impacted commerce.

The District court correctly held that an antitrust plaintiff must show at least a *de minimis* effect from defendants' conduct complained of upon U.S.-foreign commerce. B-5-6. That is the point of *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), which G&W quote at length at BO-13-14. G&W admit that the linkage between "the behavior objected to" and commerce is the correct focus on this issue. BO-14.

But the District Court suddenly and inexplicably shifted its focus *away* from El Cid's evidence that *defendant's* conduct aimed to and largely did foreclose import into the United States of large amounts of Tipuani gold and the proceeds of gold by Groves, Kilpatrick, and El Cid, as well as by South American Placers, Inc. of New York (JA-232-33), Sunshine Mining Co., Inc. of Idaho (JA-61, 72), and any and all others.* B-6. Instead, the court turned its focus to what is traditionally a "standing to sue" issue, namely, *plaintiff's* intent and preparedness to mine the Tipuani gold and bring it into the United States. Perhaps the court's erroneous shift from the "commerce" issue into the "preparedness" issue explains why astute G&W counsel thought we had failed to address the former. Those less versed in the case are bound to be more confused.

In discussing this "preparedness" issue the G&W brief ignores, as it must, the controlling facts that El Cid was fully prepared

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* G&W claim that Bolivian law required all Tipuani gold to be sold to the Bolivian government. BO-12. The District Court, however, specifically rejected that claim, stating: "For these purposes, we join plaintiff in rejecting defendants' contention that Bolivian gold can be sold only to the Bolivian government." B-16. G&W did not appeal that ruling.

to go forward in joint venture with the United States-based Groves or Kilpatrick, Groves was similarly prepared until defendants drove it off, and Groves proved the adequacy of these preparations by going forward alone with another Bolivian mine. BO-17-18. Why the lower courts also ignored these facts we cannot explain but this Court can correct.

G&W state, "At best, El Cid asks this Court to review factual findings by the courts below, a practice not engaged in by this Court." BO-17. But this case never reached "factual findings." More to the point is this Court's statement in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> We believe that summary procedures should be used sparingly in complex antitrust litigation. ... Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

In this case, with all respect, the lower courts tried the case by affidavit and other papers, drew inferences in favor of defendants instead of plaintiff or actually ignored the evidence that favored plaintiff, and then misapplied the law.

The Federal Supplement antitrust decision in this case holds that the issue of whether defendants' wrongful conduct had the necessary *de minimis* impact on U.S.-foreign commerce depends upon whether plaintiff alone had made sufficient preparations to go into business. This garbled misstatement of the law led to injustice in this case and threatens to do so in others. We respectfully ask the Court to hear and correct it.

Point 2. *The District Court's Holding on Injury to Competition in a Geographic Market Conflicts with Decisions of the Fifth Circuit and Ninth Circuit as well as Its Own District.*

G&W say that in *Brunswick* this Court made it "abundantly clear that injury to competition, as opposed to mere injury to a competitor, is the *sine qua non* of an antitrust violation."

BO-14. That is absolutely correct as far as it goes, but it leaves a gaping gap into which the District Court fell. It begs the question of when injury to *competitors* is injury to competition. Impairment of the competitive freedom of all competitors obviously injures competition, but the District Court used the literal phrasing of *Brunswick* (the antitrust laws protect "*competition* not *competitors*") to blind itself to this truism.

A district court in the Third Circuit misread *Brunswick* similarly in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F.Supp. 1100, 1253n.237 (E.D.Pa. 1981), *modified on other grounds*, 723 F.2d 238 (3rd Cir. 1983), *cert. granted*, 105 S.Ct. 1863 (1985) (argued 11/12/85), as follows:

> Because the antitrust laws are designed to protect competition, not competitors, evidence which shows only injury to individual firms cannot be used to infer injury to the competitive process.

All that that court apparently meant in context was that proof of injury to individual firms is not alone sufficient to show anti-competitive effect, since such injury may have arisen from causes other than defendants' conduct. The misreading of *Brunswick* there had less serious immediate consequences than the one herein.

Part and parcel of the District Court's misinterpretation of *Brunswick* was its confusing misuse of a Clayton Act §7 standard to test the anti-competitive effect of defendants' acts in this case. B-8-10. A §7 standard is appropriate, as it was in the *Northwest Power* case relied on by the court at B-8-9, when defendants' only attack is against plaintiff alone and the only possible injury to competition arises from plaintiff's elimination from the relevant market. In the present case, in contrast, defendants' secret buying of preferential legislation, tying up of property through admittedly "phony" lawsuits, etc. (PC-5-8)

were aimed at destroying all competition for the Tipuani gold fields.* This misapplication of a §7 standard to broadly anti-competitive activity is a dangerous precedent to have on the books.

G&W say at BO-14:

> The Bolgol Concessions are government granted monopolies and competition cannot be affected because one company, rather than another, becomes the owner.

Standard Oil might as well have argued that only one company can own the domestic oil industry. The Tipuani Valley had many concessions. JA-230-39. The issue is whether the competition for the prizes is reasonable or unreasonable, not whether the prizes end up with only one owner.

Echoing the District Court, G&W continue, at BO-15:

> But if the market is the Tipuani Valley, one must wonder why what happened in that market should be of concern to this Court.
>
> The record is devoid of evidence to show how anything that happened in the Tipuani Valley of Bolivia impacted upon an American competitor, or upon trade with the United States, or upon interests protected by our antitrust laws. To defind the market as the Tipuani Valley is senseless. That is the source of supply.

The Fifth Circuit gave short shrift to these G&W/lower court positions in the *Mitsui* case discussed at PC-11-12.** G&W say

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* I respectfully call the Court's attention to a typo in the middle of CP-5. "PROTECT" in the first line of the quoted telex should be "PROYECT."

** G&W also say that our Petition "grossly misdescribes" *Mitsui* on the geographic market issue, but go on to explain that that plaintiff's posture differed from El Cid's on the preparedness issue. BO-16.

(BO-17) that *Mitsui* is "a far cry from the case at bar," but quote language in *Mitsui* that shows the opposite, as follows:

> Here an American corporation with an interest in protection of its import business has allegedly conspired to eliminate a potential American competitor in both the business of purchasing logs in Indonesia and the business or importing lumber and lumber products into the United States. 671 F.2d 876 at 884.

Likewise in the case at bar, an American corporation, G&W, with an interest in protecting its $2,275,000 investment in the Tipuani project, conspired to eliminate Groves (U.S.), Kilpatrick (U.S.), El Cid and all other potential American and foreign competitors in both the business of mining gold in Bolivia and the business of importing gold and the proceeds of gold into the United States.

The Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), cited by G&W at BO-12-13, similarly held it error to dismiss an antitrust claim that alleged that United States defendants harrassed and disrupted United States and Honduras plaintiffs' efforts to acquire lumber in Honduras and import it into the United States. "Market" should have been no more of a problem in the instant case than it proved to be in *Timberlane* or in *Mitsui*.

In *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F.Supp. 680 (S.D.N.Y. 1979), the G&W defendants there used much the same tactics as they used in the instant case to block plaintiffs, some of whom had not yet begun operations, from developing a tourist area that G&W wanted for itself in the Dominican Republic. The Southern District of New York sustained plaintiffs' market, effect on competition and commerce, and antitrust claims. Why the lower courts herein did not follow *Dominicus* and avoid error, again, we cannot explain but this Court can correct.

This case gives the Court an opportunity to explain the ambiguity in *Brunswick* once and for all, and to make some clear pronouncements that are badly needed about market definition and effect on commerce and competition.

Point 3. *The Choice of Law Issue Merits Review if Any Such Issue Ever Merits Review.*

G&W directed, controlled, and paid for intentionally tortious acts from its Gulf + Western Plaza headquarters a few miles north of both lower courts in New York, New York. But the lower courts held that El Cid cannot seek redress under New York tort law. That is not right.

The G&W choice-of-law argument is essentially that this Court cannot touch the issue. They rely on *Butner v. United States*, 440 U.S. 48, 57-58 (1979), in which "the parties have argued the [real property] state-law questions at great length, each stressing different aspects of the record." BO-20. But the present case is precisely the opposite, as it would seem hard and pointless for the parties to stress at great length different aspects of the short list of factors that Judge Knapp considered in making a choice of law.

In the negligence case of *Richards v. United States*, 369 U.S. 1, 16n.35 (1962), this Court stated that it "ordinarily" accepts a Court of Appeals determination of state (choice-of-law) interpretation, at least where petitioner does not contest that interpretation. In this case, however, where "most significant relationship" is the issue and where the intentionality, direction, and funding of the intentional tort occurred in New York, mere agents acted in Bolivia, and the injury to El Cid's business was suffered in Costa Rica, this is not an ordinary case.

If this Court will ever again review a choice-of-law decision, we submit that it probably has before it an ideal case in which to do so now. The New York law is agreed. The record is simple. The lower courts' misapplication is clear and appears arbitrary. The injustice was great. Is such a case not reviewable

at this level? The answer to that question goes beyond the interests of the parties. It goes to the administration of justice, and should be of interest to all Courts of Appeals.

CONCLUSION

For the foregoing reasons and those previously stated, a writ of certiorari should issue to review the orders herein of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: Norwalk, Connecticut
November 26, 1985